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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 1076

ALBERT W. HAMILTON, A MINOR, BY ALBERT HAMILTON, HIS GUARDIAN AD LITEM, ET AL.,

Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 (1) of the Rules of this Court, appellants submit this statement showing that the appeal in the above entitled cause is properly before this Court.

Opinion Below.

The opinion of the Supreme Court of California (R. 48-9) is reported in 87 Cal. Dec. 88.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928.

(1) Appeal Timely Taken.

The order from which this appeal is taken was entered on January 8, 1934 (R. 84). A petition for appeal accompanied by assignments of error was, on March 8, 1934, presented to the Hon. William H. Waste, Chief Justice of the Supreme Court of California, and was by him denied on March 12, 1934. A petition for appeal was then presented to Mr. Justice Sutherland and was by him allowed on April 6, 1934 (R. 58).

(2) Finality of Judgment.

The judgment forming the basis of the appeal is final both in form and in substance and disposes of all the elements of the controversy in the court below.

(3) Judgment of the Highest Court.

The judgment of the Supreme Court of California is that of the highest court in which, under the laws of the state, such judgment could be had. The case originated with a petition for writ of mandate filed in the Supreme Court of the state as a court of original jurisdiction. The court denied the writ, and there is no appeal or other proceeding which can be had in the courts of the State of California.

(4) Validity of State Statutes Drawn Into Question and Decision in Favor of Their Validity.

In this case appellants contended in the court below that certain state statutes, as applied, were repugnant to the Constitution of the United States, and the decision rendered by the court below was in favor of their validity.

(a) *The Statutes.*

The statutes whose validity was drawn into question are:

(i) The Organic Act creating the University of California (Statutes 1868, p. 248, Sec. 6) provides as follows:

> The University shall have for its design, to provide instruction and complete education in all the departments of science, literature, art, industrial and professional pursuits, and general education, and also special courses of instruction for the professions of agriculture, the mechanic arts, mining, military science, civil engineering, law, medicine and commerce, and shall consist of various colleges; * * *
>
> SECTION 3 * * * Any resident of California of the age 14 years or upwards, of approved moral character, shall have the right to enter himself in the University as a student at large * * * on such terms as the Board of Regents may prescribe.

(ii) Article IX, Section 9 of the Constitution of the State of California which provides:

> The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds. * * *

(iii) Pursuant to the above provisions of the Organic Act and of the Constitution of the State of California, the Regents of the University of California on September 15, 1931, had promulgated an order (R. p. 3, lines 15-25) requiring that,

> "Every able bodied student of the University of California who, at the time of his matriculation at the University, is under the age of twenty-four years and a citizen of the United States and who has not attained full academic standing as a junior student in the University and has not completed the course in military science and tactics offered to freshmen and sophomore students at the University shall be and is hereby required as a condition to his attendance as a student to enroll in and complete a course of not less than one and one-half units of instruction in military science and tactics each semester of his attendance until such time as he shall have received a total of six units of such instruction or shall have attained full academic standing as a junior student."

The rules and regulations of The Regents of the University of California have the same force and effect with reference to matters pertaining to the University as the acts of the legislature of the State of California have with reference to the state. Except as to investment of University funds as above provided in Article IX, Section 9 of the Constitution, the acts of the Regents have superior force to those of the legislature of the state with reference to matters pertaining to the University.

Williams v. *Wheeler,* 23 Cal. App. 619.

Looking at it in a light most favorable to the appellees, the regulation is "an order, legislative in character, made by a state bureau," and therefore is a "statute" within the meaning of the Jurisdictional Act of 1925.

Sultan Railway and Timber Co. v. *Department of Labor and Industries,* 277 U. S. 135, 136.

King Manufacturing Co. v. *City of Augusta,* 277 U. S. 100, 113.

The Supreme Court of California interpreted the Act of 1868 and Article IX, Section 9 of the Constitution as au-

thorizing the Board of Regents to make the above regulation and to apply it in the manner in which it was applied in the present case.

(b) *Application of the Statutes.*

Pursuant to the above provisions the University authorities required all able-bodied male students who are citizens of the United States to attend courses in military training prescribed by the War Department for infantry units of the Senior Division of the Reserve Officers Training Corps, the primary object of which is "to qualify students for appointment in the Officers Reserve Corps of the United States Army". These courses include instruction in rifle marksmanship, scouting and patrolling, drill and command, musketry, combat principles and use of automatic rifles. Arms, equipment and uniforms for the use of the students in said courses are furnished by the War Department of the United States Government. (R. 3, lines 19-25.)

Appellants herein, as members of the Methodist Episcopal Church, have adopted and feel themselves morally, religiously and conscientiously bound by the tenets and principles of the said Church. Each of them is a follower of the teachings of Jesus Christ, accepting as a guide for his life the teachings of Jesus and of the Bible, and believes that war and training for war and military training are immoral and wrong, and contrary to the letter and spirit of the teachings of Jesus and of the precepts of the Christian religion (R. 4).

We stress these facts because in the case of Pearson v. Coale et al., 167 *Atl.* 54, *the Court of Appeals of Maryland intimated that the conscientious scruples of the appellees therein were a pretense, rather than the cause, for refusal to attend military training. Not so in this case. The above facts were set forth in the petition for writ of mandate, and*

they have never been controverted, either by pleadings or otherwise.

Appellants, Albert W. Hamilton and W. Alonzo Reynolds, Jr., had enrolled in the University on or about October 1, 1933, and were in good standing (R. 2, lines 18-25). Soon after their matriculation they petitioned the University authorities for exemption from military training in the R. O. T. C. on the ground that participation in such military training was contrary to their religious and moral beliefs. Their petition was denied (R. 7, lines 4-12). The Bishop of the Methodist Episcopal Church in California and others then petitioned the Regents of the University of California to make military training optional rather than compulsory, and to exempt appellants herein from compulsory service in the R. O. T. C., and not to cause the appellants herein to violate and foreswear their conscientious and religious beliefs (R. 7, lines 12-25). That petition was likewise denied (R. 8, lines 1-7). Appellants then respectfully declined to participate in military drill and they were suspended from attendance at the University (R. 8-9). Thus the statutes were applied.

(c) *Nature of the Case.*

Appellants then brought this suit for writ of mandate in the Supreme Court of California to compel appellees to reinstate appellants as students of the University, alleging the above facts. They claimed that under the constitution and laws of the State of California the appellees herein had no power or authority to compel appellants to attend courses in military instruction in the R. O. T. C. and that if, under the law of California, the appellees have such authority, then such authority is contrary to and violates appellants' constitutional rights under the Federal Constitution (R. 9-10). No answer or other pleading was filed in behalf of appellees or any of them.

By order dated December 11, 1933, and without affording appellants an oppoortunity to be heard, the petition for writ of mandate was denied (R. 84). Appellants then filed a petition for rehearing. On January 8, 1934, the Supreme Court of California rendered an opinion and order denying the petition for rehearing, holding that under Article IX, Section 9, of the Constitution and under the Organic Act creating the University, the appellees had the power and authority to promulgate and enforce the above rules and regulations and that none of the appellants' rights guaranteed by the Constitution of the United States had been violated thereby (87 Cal. Dec. 88).

(d) *Constitutional Questions Timely and Sufficiently Raised.*

At the outset we should like to make clear the distinction between the regulation of the Regents requiring students to attend courses in military training for at least two years, and the orders of the University authorities requiring drilling in the R. O. T. C. and suspending appellants for refusal to comply. It is the former regulation that we call a "statute" within the meaning of *Sultan Railway & Timber Co.* v. *Department of Labor and Industries, supra.* The latter orders are applications of the former, and are not here included under the term "statute". In view of the fact that under the practice in California, the statutes are not set out in the pleadings, both types of orders were paraphrased, and the language in which the validity of the statute was drawn into question in the petition for writ of mandate is perhaps not as precise as it would have been, had the statute been specifically referred to as being violative of the specific provisions in the Constitution of the United States. But the law sets no formula for "drawing into question" the validity of a statute.

"There are various ways in which the validity of a state statute may be drawn into question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

"Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

Bryant v. *Zimmerman*, 278 U. S. 63, 67.

In the petition for mandate, appellants referred to the requirement of "enrollment and participation in said courses in military training for at least two years of all able-bodied male students who are citizens of the United States" (R. 3, lines 16-19), and claimed that this requirement, as applied, violated appellants' rights "under the constitution and laws of the State of California, and of the United States." The specific claims of invalidity of the requirement under the federal constitution are set forth in the "Memorandum of Points and Authorities" filed together with and referred to in (p. 10, lines 5-7) the petition. These appellants claimed violation of rights under Sec. 1 of the Fourteenth Amendment (p. 17, lines 25-26; p. 18, lines 18-26) and that the regulation also violated the supreme law of the land embodied in the Kellogg Pact (p. 20).

The claims of invalidity of the regulation referred to as the "statute", however, are so interwoven with the claims of invasion of federal rights by the application of the statute, that appellants do not rest upon the claim that the validity of the statute was drawn into question in the peti-

tion for mandate. There is no doubt, however, that the claims of right under the constitution and treaty are sufficient for sustaining the jurisdiction for certiorari under Sec. 237(*c*) of the Judicial Code.

Citizens National Bank v. *Durr*, 257 U. S. 99, 106-7.

Before any answer or other pleading was filed by the appellees, the petition for writ of mandate was denied, without an opinion (R. 84). Appellants then filed a petition for rehearing which was likewise denied, but with an opinion by the court (R. 49). In that opinion, the Supreme Court of California held that under the Organic Act of the University (Act of 1868) and under Article IX, Section 9 of the State Constitution, the Regents had "full power and authority * * * to prescribe the nature and extent of the courses to be given, and to determine the question of what students shall be required to pursue them." The court then said that it found in the cause "no violation of rights assured to the petitioners by the Constitution of the United States."

A fair implication of the language used in the opinion is that the statutes, *i. e.* the Act of 1868 and Article IX, Section 9 of the Constitution, as applied by the Regents, did not violate constitutional rights. If so, the validity of the statutes was "drawn into question" by the court below, and it is immaterial whether the appellants themselves had raised constitutional questions.

Home Insurance Co. v. *Dick*, 281 U. S. 397, 407.
Silver v. *Silver*, 280 U. S. 117, 122.
Mallinckrodt Works v. *St. Louis*, 238 U. S. 41, 49.

Assuming, however, that the language used in the opinion is to be construed strictly against the appellants, to mean that "no violation of rights" was involved irrespective of the statutes as applied, appellants will proceed

to show that they had timely "drawn into question" the validity of the statutes in their petition for rehearing, even if the court below had not, in its opinion denying the petition for rehearing, touched on the federal questions.

Missouri ex rel. Missouri Insurance Company v. *Gehner*, 281 U. S. 313, 320.

The validity of all the three statutes, as applied, was drawn into question. First, we shall take the Act of 1868 and Article IX, Section 9, the statutes delegating governmental powers to the Regents. These statutes were specifically set forth in the petition for rehearing (pp. 26-7). Appellants then claimed that these statutes could be valid only if the powers delegated therein were not exercised arbitrarily and unreasonably (p. 27). Appellants then proceeded to test the validity of the application of these statutes under the California Constitution (pp. 28-30). But it is evident that appellants did not intend to rest on their claim that these statutes were invalid only under the California Constitution. After discussion of the proposition that invasion of the rights of religious liberty by this arbitrary and unreasonable application of the statutes was contrary to the First Amendment (pp. 31-33), appellants proceeded to show that this right was protected by the due process clause of the Fourteenth Amendment (p. 33) in the same manner as freedom of speech, of the press, and of contract (pp. 33-37). Thus the two statutes were drawn into question under the due process clause.

The validity of the third "statute," that is, the legislative order of the Regents, was also drawn into question under the due process clause of the Fourteenth Amendment. The legislative order of the Regents is embodied in or referred to on p. 23, lines 19-22, Petition for Rehearing. On pp. 42-43, appellants argued that compulsory military training, as applied, was contrary to the due process clause of

the Fourteenth Amendment, by referring to and adopting (p. 43, lines 10-14) the discussion concerning the invalidity of the other two statutes under the state constitution.

The argument under the "privileges and immunities clause" of the Fourteenth Amendment (pp. 37-42) refers to the "suspension" of the appellants from the University. In other words, it is an attack on the application of the statutes. In view of the fact, however, that the statutes had already been drawn into question under the Fourteenth Amendment—and for purposes of jurisdiction, it was not necessary to specify the particular clause of the Fourteenth Amendment—the attack on the application of the statutes under the privileges and immunities clause was part of the attack on the validity of the statutes themselves, as applied, under the Fourteenth Amendment.

The "statute" referred to as the regulation of the Regents is directly drawn into question as being in conflict with the Kellogg Pact (p. 44). Here the appellants claimed that not merely their suspension from the University, or the requirement that they attend the R. O. T. C. drill, but that the compulsory military training violated the Kellogg Pact. On p. 24 of the petition for rehearing, the validity of Article IX, Section 9 of the State Constitution was also drawn into question as being contrary to the treaty and, therefore, to the supreme law of the land.

(5) Scope of Jurisdiction on Appeal.

We have assigned as error (R. 51-55) the ruling of the court below that the statutes and regulation as applied did not violate appellants' rights under the due process clause and privileges and immunities clause of the Fourteenth Amendment and that they did not transgress the supreme law clause in Article VI, Cl. 2 of the Constitution.

(a) *Application of the Statutes Without Due Process.*

This Court has jurisdiction on appeal to determine whether a state statute, not invalid on its face, is unconstitutionally applied.

Fiske v. *Kansas*, 274 U. S. 380, 385.
Panhandle Oil Co. v. *Knox*, 277 U. S. 218, 222.
Quaker Cab Co. v. *Pennsylvania*, 277 U. S. 389, 401.

In this case appellants are not contending that the state may not, consistently with the due process clause, organize a university and delegate to the Regents the authority to make all rules necessary and proper for the administration of such educational institution. Nor do appellants maintain here that a statute authorizing the Regents to make rules providing courses in military instruction is violative of the due process clause. Appellants do not maintain here that under no circumstances may the Regents, consistently with the due process clause, *require* the attendance of students in courses of military science or tactics. Appellants *do contend* that the requirement of attendance in such courses by students whose religious and moral convictions forbid them to participate in such instruction is so arbitrary and unreasonable as to violate the due process clause of the Fourteenth Amendment.

There is no express provision in the Constitution guaranteeing freedom of religion from encroachments by the states. The principle of religious freedom, however, is so deeply imbedded in our fundamental concepts of justice that any invasion of it must be considered contrary to the due process clause of the Fourteenth Amendment.

Snyder v. *Massachusetts*, No. 241, October Term, 1933, decided January 8, 1934.

The principle that the limitations in the First Amendment against violations of freedom of speech and of the

press are also limitations on the powers of the states under the due process clause of the Fourteenth Amendment,

Stromberg v. *California,* 283 U. S. 359.
Near v. *Minnesota,* 283 U. S. 697.

applies, we submit, equally to freedom of religion.

Although in the earlier cases, like *Permoli* v. *First Municipality,* 3 How. 609, and *United States* v. *Cruikshank,* 92 U. S. 542, this Court has held that the guaranty against encroachments on freedom of religion in the First Amendment was a guaranty against the Federal government, and not against the states, the later cases above cited clearly indicate that the guaranty of such fundamental rights as freedom of speech and of the press is protected by the due process clause of the Fourteenth Amendment. In *Meyer* v. *Nebraska,* 262 U. S. 390, 399, and *Pierce* v. *Society of Sisters,* etc., 268 U. S. 510, 535, this Court intimated that religious liberty is one of the liberties protected by the due process clause of the Fourteenth Amendment. However, this Court has never had occasion to pass directly on this question. We think it is one of great importance and should be determined by this Court. Surely, if, as this Court held in *Adkins* v. *Children's Hospital,* 261 U. S. 525, the freedom of contract may not be interfered with, under the Fourteenth Amendment, it would seem clear that freedom of religion would likewise be protected. After all, whatever may be the doubts that this country came into being for the purpose of exercising freedom of contract, there is no doubt that it came into being for the purpose of establishing freedom of religion.

(b) *Abridgment of Priviliges and Immunities.*

In addition, appellants maintain that the above statutes and the regulations made thereunder abridge the privileges and immunities enjoyed by the appellants as citizens of the

United States. In this connection appellants do not maintain that citizens of the United States are not subject to call for military service, or that the United States Government may not in times of war compel military service as part of the program of preparedness for war. Appellants do contend that as citizens of the United States *they may not be forced into any branch of the federal military service without appropriate Congressional action.* The Constitution gives *Congress* the power to raise and support armies.

Selective Draft Cases, 246 U. S. 366, 377.

Until there is such Congressional action, the citizens of the United States are privileged and immune from being compelled to serve in the military forces of the United States.

The R. O. T. C. is a part of the military forces of the United States. It was organized under an act of Congress (10 U. S. C. 381). This act authorizes the President to organize and maintain a Reserve Officers Training Corps in educational institutions specially designated by the Secretary of War. The War Department furnishes officers of the regular army as instructors in military science and tactics and also provides the necessary equipment. It was not the intention of Congress to provide that the students taking military instruction in the R. O. T. C. in State institutions should be compelled to take this instruction.

36 Opinions of Attorney General 297.

That Congress did not intend that this military instruction be made compulsory in State institutions, is evident from another provision in the same act authorizing the establishment of R. O. T. C. units in private educational institutions where the courses may be made either elective or compulsory. The omission of such provisions with reference to the establishment of R. O. T. C. units in State

institutions was evidently in recognition of the well known rule of constitutional law that States and their agencies, but not private persons, are restrained by Section 1 of the Fourteenth Amendment.

At the University of California, military science and tactics are taught, and military training and drill are required of students as members of the R. O. T. C. That organization is no part of and has no connection with the military establishment of the State of California. The State's military code contains no mention of or reference to the R. O. T. C.

Appellants do not find it necessary to argue in this case that the State may not compel its citizens to do military service in times of peace for the State's own purposes and in the State's own organizations. But, where the State undertakes to compel citizens of the United States to do *an act for Federal purposes,* it is subject to the same limitations as are imposed by the Constitution on the Federal Government.

Gambino and Lima v. *United States,* 275 U. S. 310.

The Federal Government cannot compel appellants to do military service in any branch of the military department of the United States without appropriate Congressional action. And any compulsion by the State in this regard is an abridgment of privileges and immunities contrary to the Fourteenth Amendment.

The stock answer to this argument is that if the appellants do not wish to participate in military drill, contrary to their religious convictions, let them go elsewhere, that the State need not grant them the advantages of education, if they do not wish to comply with this condition. While we do not intend to argue the case on the merits, in this statement as to jurisdiction, but only to point out that the Federal question here presented is not so unsubstantial

that the appeal should be dismissed for the want of a substantial Federal question, it is apt to point out that a State may not grant a right or even a privilege conditioned upon a surrender of constitutional rights or of privileges and immunities of citizens of the United States.

Home Insurance Co. v. *Morse*, 20 Wall. 445, 456.

Frost v. *Corporation Commission of Oklahoma*, 278 U. S. 515.

(c) *Supreme Law of the Land.*

Whether the right of the State of California to compel those students of the University who are citizens of the United States to serve in any branch of the military forces of the United States should be given broad or narrow construction is a question which should be considered in the light of the policies of the United States. We submit that compulsory military training, announced by the University as being primarily for the purpose of training officers for the United States Army, violates the spirit, if not the letter, of the Kellogg Pact of 1928, which is a part of the Supreme Law of the Land. In that Treaty, the United States led more than fifty nations in a solemn compact never to resort to other than pacific means in the settlement of international differences. This Treaty should be given a liberal construction in determining how far the states may impinge this policy of the federal government.

Jordan v. *Tashiro*, 278 U. S. 123, 127.

It has long been recognized that as a necessary step to the preservation of peace among nations, armaments should be limited. We are not unmindful of the rule that the federal government may, as all sovereigns may, violate treaty obligations. The federal government may adopt a program of preparedness in order to guard itself against possible violations of the Kellogg Pact by other

nations. But the states of the Union are bound by the treaties as a part of the Supreme Law of the Land.

WHEREFORE it is respectfully submitted that the appeal in the above entitled cause comes within the proper jurisdiction of this Court.

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